Supreme Court, U.S.
FILED
JUL 2 1991
OFFICE OF THE CLERK

NO. 91-83

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ANA LUCIA HODGE, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' APPENDIX

RICHARD S. FISCHER
Counsel of Record for Petitioners
408 East Pillar Street
P. O. Box 631946
Nacogdoches, Texas 75963-1946
(409) 564-2222

CARTER C. WHITE
Counsel for Petitioner
Harold J. Amador-Castillo

APPENDIX A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-4122

ANA LUCIA HODGE,
Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service

(April 4, 1991)
(Reported at 929 F.2d 153 (5th Cir. 1991))
Before GOLDBERG, KING AND DUHÉ, Circuit Judges.
KING, Circuit Judge:

Petitioner Ana Lucia Hodge (Hodge) is a Colombian citizen who prevailed in deportation proceedings brought by the respondent Immigration and Naturalization Service (INS). She now petitions for review of a decision by the Board of Immigration Appeals (BIA) denying her motion for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. We find that the EAJA does not apply to deportation proceedings before the INS, and therefore deny Hodge's petition for review.

I. Background

The INS commenced deportation proceedings against Hodge on August 3, 1988, with the issuance of an Order to Show Cause, charging that Hodge was deportable under 8 U.S.C. § 1251(a)(2) as an alien who remained in the United States for a longer period of time than permitted by the INS. A superseding Order to Show

Cause was issued on December 8, 1988, in which Hodge was charged to be deportable under 8 U.S.C. § 1251(a)(9)(B) as an alien whose conditional permanent residence was terminated under 8 U.S.C. § 1186a.

On February 22, 1989, an immigration judge terminated the deportation proceedings as improvidently begun in light of INS's failure to comply with 8 C.F.R. § 103.2(b)(2) when terminating the petitioner's conditional permanent resident status. On March 23, 1989, Hodge submitted a motion for attorney's fees under the EAJA. The immigration judge dismissed Hodge's request for lack of jurisdiction. On June 7, 1989, Hodge appealed the decision of the immigration judge to the BIA. The BIA affirmed the decision of the immigration judge and dismissed the appeal on February 1, 1990, on the basis that the Attorney General "has determined that immigration proceedings do not come within the scope of the EAJA" and "absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA."

II. Discussion

Under the Equal Access to Justice Act, parties in certain adversary administrative proceedings may recover attorney's fees and costs from the government. 5 U.S.C. § 504(a)(1) provides that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." The EAJA primarily serves to ensure that individuals "will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights." [1]

---

1. H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 132-33.

Under 5 U.S.C. § 504(b)(1)(c)(i), an "adversary adjudication" is defined as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . . " Section 554 of Title 5 delineates the procedures for agency adjudications required under the Administrative Procedure Act (APA). Our determination of whether the EAJA applies to deportation proceedings before the INS requires us to consider the interrelationship between the INA, the APA, and the EAJA. Specifically, we must decide in this case whether Congress, in defining the scope of the EAJA, intended the term "under section 554" to encompass deportation proceedings.

Deportation proceedings (brought pursuant to the INA) comport closely with the requirements of the APA because the procedural dictates for deportation proceedings were modeled after the APA's requirements for adjudications. *See Marcello v. Bonds*, 349 U.S. 302, 309 (1955). Given the close resemblance of deportation proceedings to APA adjudications, Hodge asserts that the delimiting phrase of the EAJA — adjudications "under section 554" — applies to adjudications conducted consistent with the requirements of section 554, even if they are not directly governed by section 554.[2]

2. The Supreme Court held in *Marcello v. Bonds* that the statutory provisions of the INA related to deportation proceedings expressly supersede the hearing provisions of the APA, 349 U.S. at 310. According to the Ninth Circuit's interpretation of *Marcello* in *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (en banc), *Marcello* held only that the INA supercedes the APA's hearing provisions where the two statutes diverge. Because the hearing provisions of the two statues have, since *Marcello* was decided, become "fundamentally identical," the court reasoned that there is nothing for the INA to supercede and the *Marcello* holding therefore does not apply to foreclose the application of the EAJA to deportation proceedings. 838 F.2d at 1025. We are not convinced by the Ninth Circuit's argument. Even though the technical holding of *Marcello* was that the INA supercedes the APA, the Court referred to "the direction in the [INA] that the methods therein prescribed shall be the *sole and exclusive* procedure for deportation proceedings." 340 U.S. at 310 (emphasis added). The Court stated, moreover, that "this clear and categorical direction was meant to *exclude* the application of the Administrative Procedure Act . . . ." *Id.* at 309 (emphasis added). The Court stated, finally, that the APA "was intended only as a model." *Id.* Based upon this language, we cannot conclude that the Supreme Court

A. Statutory Analysis of the EAJA

1. Statutory Language

Hodge relies on the Ninth Circuit case *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*) (holding EAJA applies to deportation proceedings), for the proposition that the words "under section 554" — as used in section 504 of the EAJA — encompass adjudications "as defined by section 554." *Id.* at 1024. The Ninth Circuit found that this reading was supported by the EAJA's legislative history, its remedial purposes, and the interpretation given the statute by the Administrative Conference of the United States (ACUS). *Id.* at 1023-26.

Other circuits, however, have reached a contrary conclusion. The Third, Sixth, Eleventh, and D.C. Circuits have all stated that, although the remedial purposes of the EAJA would be served by applying it to deportation proceedings, neither the statutory language nor the legislative history of the EAJA supports the finding that Congress intended the EAJA to reach deportation proceedings. With respect to the usage of the word "under" in the EAJA, the D.C. Circuit — in addressing the question whether "under" could mean "as defined by," —was "unwilling so to stretch the word 'under' because the usage of the word in EAJA itself tugs against such creative reading . . . ." *St. Louis Fuel and Supply Co. v. FERC*, 890 F.2d 446, 449 (D.C. Cir. 1989).[3]

The court noted that the usage of the word "under" at other locations within the EAJA could mean nothing other than "subject [or pursuant] to" or "by reason of the authority of."[4] The *St. Louis*

---

intended to leave open the possibility that the APA would "govern" deportation proceedings if the INA and the APA became functionally equivalent.

3. The *St. Louis* court held that proceedings under the Department of Energy Organization Act provision on contests to remedial orders were not "adversary adjudications" covered by the EAJA.

4. The D.C. Circuit cited the following examples from the EAJA to support its analysis:

> A party seeking an award of fees and other expenses shall . . . submit to the agency an application which shows that the party is a

court noted, furthermore, that the meaning of "under" that it gleaned from the EAJA's use of the word in other locations of the Act comports with its dictionary definition, while the alternative definitions suggested by Hodge do not. *Id.* at 450 n. 4.

We are to assume "'that the legislative purpose is expressed by the ordinary meaning of the words used'" in the statute, [5] and find, based on the foregoing, that the ordinary meaning of "under," especially in the contest of the EAJA, appears to be "governed by" or "subject to." In "rare and exceptional circumstances," however, legislative history justifies departure from the plain language of a statute because it evinces legislative intent contrary to that language.[6] We therefore examine the legislative history of the EAJA to ascertain whether Congress implied an intention to extend the EAJA to deportation proceedings.

2. Legislative History

Turning to the legislative history of the EAJA for support, Hodge notes that the *Escobar Ruiz* court relied, in part, on a 1980 House conference report that described an "adversary adjudication" as "an agency adjudication *defined under* the Administrative Procedure Act where the agency takes a position

---

> prevailing party and is eligible to receive an award ***under*** this section . . . .
>
> 5 U.S.C. § 504(a)(2) (emphasis added).
>
> If a party other than the United States is dissatisfied with a determination of fees and other expenses made ***under*** subsection (a) . . . .
>
> 5 U.S.C. § 504(c)(2) (emphasis added).
>
> Fees and other expenses awarded ***under*** this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.
>
> 5 U.S.C. § 504(d) (emphasis added).

890 F.2d at 450.

5. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

6. *Rubin v. United States*, 449 U.S. 424, 430 (1981) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

through representation by counsel or otherwise." 838 F.2d at 1023 (quoting H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 5003, 5012 (emphasis added)). Several circuits have since stated, however, that this bit of legislative history provides very attenuated support for the *Escobar Ruiz* court's expansive holding.

> For example, the Sixth Circuit stated in *Owens v. Brock* that [t]he use of the words "defined under" by the House Conference report is not particularly instructive. There is no evidence in the legislative history to indicate that the conference committee understood the term "defined under" to include within EAJA coverage those proceedings that are not governed by section 554 but instead are merely conducted in a similar manner. In fact, the use of a concrete term such as "defined" leads us to believe it probable that Congress intended precisely the opposite interpretation of section 504 (b)(1)(C) from the one taken by the Ninth Circuit.

860 F.2d 1363, 1366 (6th Cir. 1988).[7] The D.C. Circuit, moreover, in *St. Louis*, criticizes the *Escobar Ruiz* court's reading of the conference report, pointing out, *inter alia*, that the definition provision placed in the conference text was identical to the one reported by the House Judiciary Committee, whose report indicates that "under" means "subject to." 890 F.2d at 450-51.

In a recent Third Circuit opinion, moreover, the court stated that "*Escobar Ruiz*'s interpretation of 'an adjudication under section 554' strikes us as strained and untenable. In our view, *Escobar Ruiz* was justifiably criticized in *Owens v. Brock* and *St. Louis Fuel and Supply Co.* for its expansive statutory interpretation." *Clarke v. INS*, 904 F.2d 172, 175 (3rd Cir. 1990) (citations omitted). The Eleventh Circuit also rejects the Ninth Circuit's statutory interpretation, stating that they "are persuaded

---

7. In *Owens*, the Sixth Circuit held that workers' compensation hearings conducted pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.*, are not adversary adjudications under the EAJA, since FECA explicitly exempts such proceedings from section 554 hearing requirements.

by the reasoning of the Sixth and District of Columbia Circuits as well as . . . [the] Third Circuit decision" that Congress intended "under" in section 504 to mean "governed by" or "subject to" section 554. *Ardestani v. United States Dep't of Justice, INS*, 904 F.2d 1505, 1510-11 (11th Cir. 1990).

Despite the overwhelming judicial authority to the contrary, we nevertheless consider Hodge's arguments in turn. Among other things, she finds support for her position in Congress' statement — in the legislative history to the 1985 amendments to the EAJA — that social security administrative hearings in which the government is represented by counsel are covered by the EAJA.[8] She argues that prior to this clarification, Congress had not determined whether the APA applied to social security hearings; therefore, in deciding to apply the EAJA to social security hearings, Congress was demonstrating its intent to enlarge the scope of the EAJA *beyond* adversary adjudications clearly "governed" by section 554. The Third Circuit, however, was "unable to draw such a clear conclusion from the legislative history" and stated that "the EAJA's 1985 legislative history strongly suggests that Congress believed social security proceedings to be covered by section 554, but considered that the hearings were not 'adversary adjudications' within the meaning of EAJA because the position of the United States was typically not represented by counsel." 904 F.2d at 176, 177. We agree with the analysis of the Third Circuit.

In two instances Congress has, on the other hand, affirmatively extended the EAJA to encompass proceedings previously considered outside the ambit of that statute. In 1985, Congress amended section 504(b)(1)(C) to include certain administrative proceedings under section 6 of the Contract Disputes Act of 1978, 41 U.S.C. § 605.[9] In 1986, Congress further

---

8. *See* H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 138-39.

9. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, § 1(c)(2)(B), 99 Stat. 184 (1985). Through this amendment, Congress

amended that section of the EAJA to incluc proceedings under the Program Fraud Civil Remedies Act of 198ᵥ, 31 U.S.C. § 3801.[10] We believe that Congress' narrowly ailored, rather than blanket, extensions of the EAJA to very specific types of administrative proceedings lends further supt ort to the inference that Congress did not intend for the EAJA t reach deportation proceedings.[11]

Moreover, prior to Congress' amendme t of the EAJA in 1985, the Attorney General, in 1984, promulga d a regulation that excluded deportation proceedings from the EA A.[12] We agree with the *Clarke* court's statement that "[a]lthough ve cannot assume that Congress implicitly ratified the At orney General's interpretation of the EAJA's reach, we likewis cannot conclude from the ambiguous legislative record that Co gress intended to overturn that regulation." *Clarke*, 904 F.2d at 177. We are also confronted with the Congressional provision in ection 292 of the INA, 8 U.S.C. § 1362, that an alien in deport tion proceedings "shall have the privilege of being represented (*at no expense to the Government*)" by counsel of his choice (emph sis added). This provision, which precludes the right to *appo nted* counsel in deportation proceedings, does not necessarily ac as a bar against fee-shifting. It is conceivable, however, that th e provision was

---

legislatively overruled the holding of *Fidelity Constr. Co. v. United States*, 700 F.2d 1379 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983). *See* H.R. Rep. No. 120, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 144

10. Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 6103(c), 100 Stat. 1948 (1986).

11. *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. . . . This principle of statutory construction reflects an ancient maxim - - expressio unius est exclusio alterius."); *see also Quarles v. St. Clair*, 711 F.2d 691, 699 n.22 (5th Cir. 1983).

12. 28 C.F.R. § 24.103.

BEST AVAILABLE COPY

intended to prevent all forms of government funding of counsel for aliens in deportation proceedings.

Further evidence of Congressional intent to broadly apply the EAJA, cited by Hodge, includes the statement accompanying the Model Rules for the Implementation of the EAJA issued by the Administrative Conference of the United States (ACUS). That statement advises agencies to take "broad interpretation of the reference to adjudications 'under section 554' largely to avoid protracted debate about whether particular proceedings fall within its ambit." It adds that "considering the purposes of the [EAJA], questions of its coverage should turn on substance . . . rather than technicalities." *Escobar Ruiz*, 838 F.2d at 1024 (quoting Administrative Conference of the United States, Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900-32,901 (1981)).

Although we find this pronouncement by the ACUS on how to effectuate the EAJA to be less compelling evidence of Congressional intent than did the *Escobar Ruiz* court, we do not reject the statement wholesale as did the *Owens* court.[13] In criticizing *Escobar Ruiz*'s interpretation of the model rules, the *Owens* court suggested that other language in the ACUS's model rules and commentary in effect adopted the "governed by" interpretation of "under." The rules state that, "[w]here it is clear that certain categories [of proceedings] are *governed by* [section 554], agencies should list the types of proceedings in their rules." 860 F.2d at 1366 (emphasis added). We do not agree with the

---

13. We also do not agree with the *Owens* court that "the ACUS rules . . . eschew a broad interpretation of 504(b)(1)(C) . . . ." The Sixth Circuit based this statement on language in the ACUS rules that "the liberal interpretation of the draft model rules may provide for broader applicability than Congress intended." The ACUS was apparently concerned with agency proceedings that voluntarily use section 554 procedures, and consequently eliminated those proceedings from EAJA coverage. We do not, nor should we, infer from the ACUS's statement that they meant, for the purposes of EAJA coverage, to equate agency proceedings that voluntarily use section 554 procedures, with those, like deportation proceedings, that are mandated to use section 554 procedures (through the mandate stems not from the APA but from other statutory authority).

Owens court that the usage of "governed by" in this context should be interpreted as a strict limitation on the application of the EAJA to proceedings that are technically governed by section 554. In our view, the provision at issue merely seeks to identify those types of proceedings that are clearly covered, leaving open the question whether proceedings that are Congressionally required to follow the procedures of 554, but are not technically governed by 554, fall within the ambit of the EAJA.

Hodge also refers to the House Report for the 1985 reauthorization of the EAJA issued by the Judiciary Committee. That report notes that the courts have been construing the EAJA too narrowly. The examples to which the House Report points, however, do not concern the issue at bar. Rather, the report refers to judicial construction of other terms in the Act, namely "position of the United States" and "substantially justified." These concerns shed no light on the question of how to interpret "adjudications under section 554." *See* 813 F.2d at 290; H.R. Rep. No. 120, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code, Cong. & Admin. News 132.

Having carefully considered the text and legislative history of the EAJA, we do not find sufficient evidence of congressional intent to apply the EAJA expansively. Although we agree that the purposes of the EAJA would be furthered by its application to deportation proceedings, we are constrained by general principles of statutory interpretation to hold that it does not apply.

B. Sovereign Immunity Waivers

Our holding is also necessarily influenced by the Supreme Court's pronouncement that statutes waiving the government's general immunity from attorneys' fee claims must be "construed strictly in favor of the sovereign" and not "enlarge[d] . . . beyond what the language requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951), and *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)). Because deportation proceedings are not clearly within the scope of the EAJA, we believe that it is incumbent upon

Congress, not this court, to enlarge the statute to include such proceedings if that is the result that Congress intended.

III. Conclusion

For the foregoing reasons, we AFFIRM the decision of the Board of Immigration Appeals and DENY the petition for review.

GOLDBERG, Circuit Judge, dissenting:

> Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore,
> Send these, the homeless, tempest-tossed to me:
> I lift my lamp beside the golden door.[1]

I cannot help but wonder how many immigrants arriving through New York harbor now wonder if the outstretched arms of the Statute of Liberty are meaningful or meaningless. I respectfully dissent from the majority's holding and would adopt the holding and rationale of *Escobar Ruiz v. I.N.S.*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*).

The Equal Access to Justice Act (EAJA) is a statutory mandate of significant value in our jurisprudence. There is no doubt in my mind that the EAJA's legislative history does not clearly indicate whether Congress intended this mandate to extend to immigration proceedings. We must therefore look to Congress' basic purpose in enacting this legislation, which was to provide access to our justice system to those who need it most. I can think of no other group more deserving than the many immigrants to this country. These people often have to appear before the Immigration and Naturalization Service (INS) without funds or friends to assist them in their legal skirmish with our government.

---

1. E. Lazarus, *The New Colossus*, in America Forever Now (1968) (inscribed on the Pedestal of the Statute of Liberty).

The application of the EAJA to INS proceedings is an important issue and one would expect there to be diverse opinions, but that does not diminish the strength of my conviction that we should reverse the Board of Immigration Appeals decision. I do not foresee a great financial cost for our government if we allow prevailing parties in deportation proceedings to recover their attorneys' fees. Absent a definitive proscription of such award in the statute, I see no reason to dash the hopes and the ambitions of the many people who must appear before the INS in order to remain in this country. Therefore, I respectfully dissent.

APPENDIX A-2

U.S. DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

FALLS CHURCH, VIRGINIA 22041

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A28 305 678 - Houston

February 1, 1990

In re: ANA LUCIA *HODGE*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard S. Fischer, Esquire
P.O. Box 631946
Nacogdoches, Texas 75963

ON BEHALF OF SERVICE: Kimberly J. Barton
General Attorney

APPLICATION: Attorney fees under the EAJA

This matter arises as a result of deportation proceedings held within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, but solely concerns the respondent's application for attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the "EAJA"). By decision dated May 10, 1989, the immigration judge denied the application for fees and costs. The respondent appeals from this decision. For the reasons set forth in *Matter of Fede*, Interim Decision 3106 (BIA 1989), the appeal will be dismissed.

The Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General.[1] *See* section 103 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1103; 28 U.S.C. §§ 503, 509 and 510. Under section 103(a) of the Act, the Attorney General has the authority to issue regulations and his determinations with respect to all questions of law are controlling. A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer. *See* sections 103(a), 236(a), and 242(b) of the Act, 8 U.S.C. §§ 1103(a), 1226(a), and 1252(b); 8 C.F.R. § 3.0; 28 C.F.R. Part 24; *Matter of Medina*, Interim Decision 3078 (BIA 1988); *Matter of Valdovino*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bilbao-Bastida*, 11 I&N Dec. 615 (BIA 1966), *aff'd Bilbao-Bastida v. INS*, 409 F.2d 820 (9th Cir. 1969), *cert. dismissed*, 396 U.S. 802 (1969); *Matter of Tzimas*, 10 I&N Dec. 101 (BIA 1962).

The Attorney General has determined that immigration proceedings do not come within the scope of the EAJA. *See* 28 C.F.R. §24.103. *See also* 46 Fed. Reg. 48921, 48922 (Oct. 5, 1981) (interim rule with request for public comment).[2] Neither this

---

1. Even the specific grants of statutory authority to immigration judges in the Act (*i.e.*, to conduct exclusion and deportation proceedings) are subject to limitations. For example, exclusion proceedings must be conducted in accordance with sections 235, 236, and 287(b) of the Act, 8 U.S.C. §§ 1225, 1226, and 1357(b), and "such regulations as the Attorney General shall prescribe." In deportation proceedings, the immigration judge may only make determinations "as authorized by the Attorney General" and the proceedings themselves must "be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

2. The supplemental information published with the 1981 interim rule made clear that the omission of deportation and exclusion proceedings from the rule was intentional. Apparently no public comments were received regarding this aspect of the interim rule. *See* 47 Fed. Reg. 15774 (1982) ("Supplementary Information").

Board nor an immigration judge has authority to consider a challenge to the Attorney General's determination in this regard. Thus, absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA. And, authority from one circuit is not binding in another. *Georgia Dep't of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988); *Generali v. D'Amico*, 766 F.2d 485, 489 (11th Cir. 1985).

In view of the controlling Departmental regulations, we find that the immigration judge in this case had no authority to consider an application for attorney fees and costs under the EAJA. Accordingly, the appeal will be dismissed and the respondent's application for attorney fees and costs under the EAJA will be denied.

ORDER: The appeal from the May 10, 1989, decision of the immigration judge is dismissed and the respondent's application for attorney fees and costs under the EAJA is denied.

James P. Morris
FOR THE BOARD

APPENDIX A-3

U.S. DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Immigration Court

Houston, Texas

File No.: A28 305 678

In re: ANA LUCIA HODGE

APPLICATION: Motion for Award of Attorney's Fees and Expenses Pursuant to the Provisions of the Equal Access to Justice Act, 5 U.S.C. 504 (a)(1)

ON BEHALF OF MS. HODGE: Richard S. Fischer, Esq.
P.O. Box 1946
Nacogdoches, Texas 75963

ON BEHALF OF SERVICE: Kimberly J. Barton, Esq.
Trial Attorney
Houston INS

DECISION AND ORDER OF THE IMMIGRATION JUDGE

In an Oral Decision issued on February 22, 1989, deportation proceedings instituted by the Immigration and Naturalization Service against the above-captioned individual were terminated by this court. The proceedings were instituted by the INS pursuant to a superseding Order to Show Cause issued August 3, 1988, and it was the finding decision and order of this court that "the proceedings were improvidently begun in light of (the Service's) failure to comply with 8 CFR 103.2(b)(2)." Both parties accepted that decision as a final determination of those proceedings.

On March 23, 1989, Ms. Hodge filed a Motion for Award of Attorney's Fees and Expenses pursuant to 5 U.S.C. Sec. 504(a)(1) (The Equal Access to Justice Act). Included with the Motion are affidavits from the attorneys who represented her in those deportation proceedings detailing services rendered and time spent, an affidavit from Ms. Hodge stating that her net worth has never been over $1,000,000.00, and a Memorandum of Law in support of the motion. The motion was timely filed under Equal Access to Justice Act requirements (within thirty days of the final decision). Additionally, the Service has failed to respond to the motion and request, and in accordance with prior advisement, the motion is therefore deemed to be unopposed. Nevertheless, for the reasons set forth below, this court must conclude that it is without subject matter jurisdiction to grant the request.

An immigration judge derives his/her authority from the provisions of the Immigration and Nationality Act, and the express delegations of authority provided by the Attorney General of the United States. *See* 8 U.S.C. Sec. 1103(a); 8 C.F.R. 3.9-.10; 28 C.F.R. 0.19. The Attorney General has expressly delegated authority to award fees under the Equal Access to Justice Act to a variety of agencies within the Department of Justice, but has not heretofore included among those agencies the Executive Office for Immigration Review or immigration judges. *See, e.g.*, 28 C.F.R. 24.103(a). In the absence of such delegated authority, it is the finding and belief of this immigration judge that I am without jurisdiction to evaluate claims arising under the Equal Access to Justice Act (henceforth "EAJA").

The only authority cited by the respondent for the proposition that awards under the EAJA are applicable to deportation proceedings is a case arising in the Ninth Circuit, *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*). Initially it is noted that this court, Ms. Hodge, and the deportation proceedings in question all are located within the Fifth Circuit. Frequently the Board of Immigration Appeals has declined to extend decisions outside the particular circuit in which they arose, especially when such decisions, such as *Escobar Ruiz*, involve radical departures

from accepted or current practice. For example, in *Matter of Benitez*, Int. Dec. 2979 at 7 (BIA 1984), the Board declined to apply *Iran v. U.S.*, 656 F.2d 469 (9th Cir. 1981) to a case arising within the Fifth Circuit when it did not find the Ninth Circuit's reasoning persuasive. Though frequently the Ninth Circuit has been in the vanguard of creative interpretations of the immigration statutes, almost as frequently those interpretations have been rejected by the Supreme Court and other courts upon further review. *See, e.g., Wang v. INS*, 622 F.2d 1241 (9th Cir. 1980), *rev'd*, 450 U.S. 139 (1980); *Lopez-Mendoza v. INS*, 705 F.2d 1059 (9th Cir. 1983), *rev'd*, 468 U.S. 1032 (1984); *Plasencia v. Landon*, 637 F.2d 1286 (9th Cir. 1980), *rev'd*, 103 S.Ct. 321 (U.S. 1982); *Miranda v. INS*, 673 F.2d 1105 (9th Cir. 1982), *rev'd*, 459 U.S. 14 (1982); *Nicholas v. INS*, 590 F.2d 802, 805-08 (9th Cir. 1979), criticized or questioned in *Wan Chung Wen*, 543 F.Supp. 1016 (W.D.N.Y. 1982), *Ali v. INS*, 661 F.Supp. 1234 (D.Mass. 1986), *Pasquini v. Morris*, 700 F.2d 658 (11 Cir. 1983), and *Fano v. O'Neill*, 806 F.2d 1262 (5th Cir. 1987).

Though a strong dissenting opinion was issued by three Ninth Circuit judges in *Escobar Ruiz*, the dissent does not appear to relate to the jurisdictional issue and concerns of this court. Of more significant relevance would seem to be the stinging criticism of *Escobar Ruiz* provided by the Sixth Circuit Court of Appeals in *Owens v. Brock*, 860 F.2d 1363 (6th Cir. 1988). The court in *Owens* criticized the *Escobar Ruiz* decision on two grounds. The first of these was the apparent failure of the Ninth Circuit to consider basic rules of statutory construction. The *Owens* court observed that in analyzing whether Congress has waived immunity of the United States, such waiver must be construed strictly in favor of the sovereign. They were therefore critical of the reasoning of *Escobar Ruiz* absent proof or evidence in the EAJA legislative history that the conference committee understood or intended that the term "defined under", as it relates to the definition of "adversary adjudication", was to include within EAJA coverage proceedings which were not governed by 5 U.S.C. Sec. 554. Instead, the Ninth Circuit independently determined that "defined under" was to include proceedings conducted in a *similar*

manner to those governed by 5 U.S.C. 554, and thereby include proceedings under 8 U.S.C. The second ground of criticism by the *Owens* court was the Ninth Circuit's misplaced reliance on the model rules for the implementation of the EAJA issued by the Administrative Conference of the United States (ACUS), in that the ACUS rules both eschew a broad interpretation of 504(b)(1)(C) and embrace the "governed under" standard rejected in Escobar Ruiz. *Owens, supra* at 1366.

The EAJA requires "an agency than conducts an adversary adjudication" to award fees and other expenses to a prevailing party, unless the position of the agency was substantially justified or special circumstances would make an award unjust, 5 U.S.C. 504(a)(1). "Adversary adjudication" is defined as "an adjudication *under section 554* of this title in which the position of the United States is represented by counsel or otherwise..." (emphasis added). 5 U.S.C. 504(b)(1)(C)(i). Section 554 of Title 5 is part of the Administrative Procedure Act. Clearly, in order for an agency to be covered by the EAJA, it would have to be one already governed by the provisions of the Administrative Procedure Act.

The United States Supreme Court has held that deportation proceedings are directly governed by the Immigration and Nationality Act rather than by the Administrative Procedure Act, and that the Immigration and Nationality Act supersedes the Administrative Procedure Act. *See Marcello v. Bonds*, 349 U.S. 302 (1955). Accordingly, deportation proceedings would not seem to be "adversary adjudications" as defined in the EAJA.

Additionally, Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, specifically provides that a respondent in deportation proceedings "shall have the privilege of being represented (at no expense to the Government)". The awarding of attorneys' fees, even where respondent is the prevailing party and/or the position of the INS was not justified, would effectively provide for representation at government expense and contrary to the express provisions of the Immigration and Nationality Act.

For the foregoing reasons, this court must conclude that it is without jurisdiction to award attorney's fees as requested. No findings are made with regard to prevailing parties, justification of INS position, or reasonableness of requested fees. The request is rejected solely upon jurisdictional grounds. Accordingly,

IT IS HEREBY ORDERED that Ana Lucia Hodge's motion for attorney's fees and expenses under the EAJA is DENIED in its entirety for lack of jurisdiction.***

May 10, 1989
Robert Brown
Immigration Judge

*** It is noted that subsequent to the completion of this decision, but prior to notification or service to the parties, the Board of Immigration Appeals issued two precedent decisions confirming the determination of this court that it lacks jurisdiction to award attorney fees under the EAJA. *See, Matter of Anselmo*, ID 3105, (BIA May 11, 1989) and *Matter of Fede*, ID 3106 (BIA May 11, 1989).
RB (May 25, 1989).

APPENDIX B-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-4440

(Summary Calendar)

RODOLFO ESCOBEDO GONZALEZ,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of
The Board of Immigration Appeals

(No. A34 451 497)

(April 22, 1991)

Before JOHNSON, SMITH, AND WIENER, Circuit Judges.

PER CURIAM:*

Petitioner Rodolfo Escobedo Gonzalez is a Mexican citizen to whom an immigration judge granted relief from deportation under Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. § 1251(f). After the Immigration and Naturalization Service (INS) withdrew its appeal, Gonzalez moved for an award of attorney's fees pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C.

---

* Local Rule 47.5 provides that "[t]he publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

§ 504. The immigration judge denied the motion; the Board of Immigration Appeals (BIA) dismissed Gonzalez' appeal and denied his application for attorney's fees. Gonzalez petitions this court for review of the BIA's decision denying his motion to recover attorney's fees and expenses.

Our recent decisions in *Hodge v. United States Dep't of Justice*, No. 90-4122 (Apr. 4, 1991), and *Amador-Castillo v. Immigration and Naturalization Service*, No. 90-4161 (Apr. 4, 1991), held--after addressing, as Gonzalez concedes, the issues he raises--that the EAJA does not apply to deportation proceedings before the INS. We, therefore, deny Gonzalez' petition for review.

APPENDIX B-2

U.S. DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

FALLS CHURCH, VIRGINIA 22041

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A34 451 497 - Houston

May 24, 1990

In re: RODOLFO *ESCOBEDO*-GONZALEZ,

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:	Richard S. Fischer, Esquire P.O. Box 631946 Nacogdoches, Texas 75963-1946
ON BEHALF OF SERVICE:	Benjamin D. Somera General Attorney
APPLICATION:	Attorney fees under the EAJA

This matter arises as a result of deportation proceedings held within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, but solely concerns the respondent's application for attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the "EAJA"). By decision dated April 17, 1990, the immigration judge denied the application for fees and costs. The respondent appeals from this decision. For the reasons set forth in *Matter of Fede*, Interim Decision 3106 (BIA 1989), the appeal will be dismissed. The request for oral argument is denied.

The Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General.[1] *See* section 103 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1103; 28 U.S.C. §§ 503, 509 and 510. Under section 103(a) of the Act, the Attorney General has the authority to issue regulations and his determinations with respect to all questions of law are controlling. A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer. *See* sections 103(a), 236(a), and 242(b) of the Act, 8 U.S.C. §§ 1103(a), 1226(a), and 1252(b); 8 C.F.R. § 3.0; 28 C.F.R. Part 24; *Matter of Medina*, Interim Decision 3078 (BIA 1988); *Matter of Valdovino*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bilbao-Bastida*, 11 I&N Dec. 615 (BIA 1966), *aff'd Bilbao-Bastida v. INS*, 409 F.2d 820 (9th Cir. 1969), *cert. dismissed*, 396 U.S. 802 (1969); *Matter of Tzimas*, 10 I&N Dec. 101 (BIA 1962).

The Attorney General has determined that immigration proceedings do not come within the scope of the EAJA. *See* 28 C.F.R. §24.103. *See also* 46 Fed. Reg. 48921, 48922 (Oct. 5, 1981) (interim rule with request for public comment).[2] Neither this

---

1. Even the specific grants of statutory authority to immigration judges in the Act (*i.e.*, to conduct exclusion and deportation proceedings) are subject to limitations. For example, exclusion proceedings must be conducted in accordance with sections 235, 236, and 287(b) of the Act, 8 U.S.C. §§ 1225, 1226, and 1357(b), and "such regulations as the Attorney General shall prescribe." In deportation proceedings, the immigration judge may only make determinations "as authorized by the Attorney General" and the proceedings themselves must "be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

2. The supplemental information published with the 1981 interim rule made clear that the omission of deportation and exclusion proceedings from the rule was intentional. Apparently no public comments were received regarding this aspect of the interim rule. *See* 47 Fed. Reg. 15774 (1982) ("Supplementary Information").

Board nor an immigration judge has authority to consider a challenge to the Attorney General's determination in this regard. Thus, absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA. And, authority from one circuit is not binding in another. *Georgia Dep't of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988); *Generali v. D'Amico*, 766 F.2d 485, 489 (11th Cir. 1985).

In view of the controlling Departmental regulations, we find that the immigration judge in this case had no authority to consider an application for attorney fees and costs under the EAJA. Accordingly, the appeal will be dismissed and the respondent's application for attorney fees and costs under the EAJA will be denied.

ORDER: The appeal from the April 17, 1990, decision of the immigration judge is dismissed and the respondent's application for attorney fees and costs under the EAJA is denied.

Mary Maguire Dunne
FOR THE BOARD

APPENDIX B-3

U.S. DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Immigration Court

Houston, Texas

File No.: A34 451 497

IN THE MATTER OF: RODOLFO ESCOBEDO-GONZALEZ,
Respondent

IN DEPORTATION PROCEEDINGS

APPLICATION: Motion for Award of Attorneys'
Fees and Expenses

ON BEHALF OF RESPONDENT: Richard S. Fischer, Esq.
408 E. Pillar
Nacogdoches, Texas 75961

ON BEHALF OF SERVICE: Benjamin D. Somera, Esq.
Trial Attorney
Houston, Texas

ORDER

Pending before the court is the motion of respondent's counsel (Richard S. Fischer, Esq.) for attorneys' fees and expenses incurred in the representation of respondent in his application for a waiver of a ground of deportation under Section 241(f) of the Immigration and Nationality Act.

Without commenting on the course of the proceedings after the hearing on the merits, the court would simply note that it

cannot imagine a case in which an award of attorneys' fees would be more warranted and appropriate. More specifically, the presentation of respondent's case by Mr. Fischer was marked by the care, preparation, precision, skill, and aggressive advocacy which are the hallmarks of every case in which this attorney appears in Immigration Court.

The Board of Immigration Appeals, however, has clearly held that, except for cases arising in those courts within the jurisdiction of the United States Courts of Appeals for the Ninth Circuit, attorneys' fees may not be awarded under the Equal Access to Justice Act to successful litigants in immigration proceedings. *Matter of Anselmo*, Int. Dec. 3105 (BIA 1989); *Matter of Fede*, Int. Dec. 3106 (BIA 1989). Accordingly, it is now hereby

ORDERED that counsel's motion for an award of attorneys' fees and expenses be DENIED.

April 17, 1990
SUSAN L. YARBROUGH
Immigration Judge

APPENDIX C-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-4161

HAROLD J. AMADOR-CASTILLO,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of
the Immigration and Naturalization Service

(INS# A 23 620 165)

(April 4, 1991)

Before GOLDBERG, KING AND DUHÉ, Circuit Judges.

PER CURIAM:*

Petitioner Harold J. Amador-Castillo (Amador-Castillo) is a Nicaraguan citizen who seeks review of a decision by the Board of Immigration Appeals (BIA) denying his application for attorney's fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.

On October 12, 1987, the respondent Immigration and Naturalization Service (INS) served Amador-Castillo with an

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Order to Show Cause (OSC), charging him with entering the United States without inspection in violation of 8 U.S.C. § 1251(a)(2). The OSC also charged him with deportability based on his being convicted of two crimes involving moral turpitude after entry in violation of 8 U.S.C. § 1251(a)(4). At his August 3, 1988 deportation hearing, Amador-Castillo conceded his deportability and applied for political asylum and withholding of deportation. In his application for asylum, Amador-Castillo claimed fear of persecution, if he returned to Nicaragua, based on his family's past employment with the Somoza regime. On August 12, 1988, the United States State Department's Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs, advised that, based on his application for asylum, Amador-Castillo had shown a well-founded fear of persecution in Nicaragua. On September 20, 1988, after a hearing on the merits, the immigration judge denied Amador-Castillo's request for withholding of deportation but granted his application for asylum.

On October 20, 1988, Amador-Castillo filed a motion for attorney's fees pursuant to the EAJA. On September 8, 1989, the immigration judge, finding that he had no authority to grant fees under the EAJA, denied Amador-Castillo's request for fees. On September 15, 1989, Amador-Castillo appealed the decision of the immigration judge to the BIA. The BIA affirmed the decision of the immigration judge and dismissed the appeal on February 1, 1990, on the basis that the Attorney General had determined that immigration proceedings do not come within the scope of the EAJA and that the immigration judge had no authority to consider an application for attorney's fees under the EAJA.

II.

The question before us in this case is whether the EAJA applies to deportation proceedings before the INS. Based on our reasoning today in *Hodge v. United States Dep't of Justice*, No. 90-4122 (5th Cir. 1991) (a copy of which is attached hereto), we find that the EAJA does not apply to deportation proceedings before the INS. Accordingly, we AFFIRM the decision of the Board of

Immigration Appeals and DENY the petition for review.

GOLDBERG, Circuit Judge, dissenting:

For the reasons stated today in my dissent in *Hodge v. United States Dep't of Justice*, No. 90-4122 (5th Cir. 1991) (a copy of which is attached hereto), I respectfully dissent.

APPENDIX C-2

U.S. DEPARTMENT OF JUSTICE

FALLS CHURCH, VIRGINIA 22041

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A23 620 165 - Harlingen

February 1, 1990

In re: HAROLD J. *AMADOR*-CASTILLO,

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carter C. White, Esquire
ACLU South Texas Project
P.O. Box 188
San Juan, Texas 78589

ON BEHALF OF SERVICE: Mike Ochoa
General Attorney

APPLICATION: Attorney fees under the EAJA

This matter arises as a result of deportation proceedings held within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, but solely concerns the respondent's application for attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the "EAJA"). By decision dated September 8, 1989, the immigration judge denied the application for fees and costs. The respondent appeals from this decision. For the reasons set forth in *Matter of Fede*, Interim Decision 3106 (BIA 1989), the

appeal will be dismissed. The request for oral argument is denied.

The Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General.[1] *See* section 103 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1103; 28 U.S.C. §§ 503, 509 and 510. Under section 103(a) of the Act, the Attorney General has the authority to issue regulations and his determinations with respect to all questions of law are controlling. A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer. *See* sections 103(a), 236(a), and 242(b) of the Act, 8 U.S.C. §§ 1103(a), 1226(a), and 1252(b); 8 C.F.R. § 3.0; 28 C.F.R. Part 24; *Matter of Medina*, Interim Decision 3078 (BIA 1988); *Matter of Valdovino*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bilbao-Bastida*, 11 I&N Dec. 615 (BIA 1966), *aff'd Bilbao-Bastida v. INS*, 409 F.2d 820 (9th Cir. 1969), *cert. dismissed*, 396 U.S. 802 (1969); *Matter of Tzimas*, 10 I&N Dec. 101 (BIA 1962).

The Attorney General has determined that immigration proceedings do not come within the scope of the EAJA. *See* 28 C.F.R. §24.103. *See also* 46 Fed. Reg. 48921, 48922 (Oct. 5,

---

1. Even the specific grants of statutory authority to immigration judges in the Act (*i.e.*, to conduct exclusion and deportation proceedings) are subject to limitations. For example, exclusion proceedings must be conducted in accordance with sections 235, 236, and 287(b) of the Act, 8 U.S.C. §§ 1225, 1226, and 1357(b), and "such regulations as the Attorney General shall prescribe." In deportation proceedings, the immigration judge may only make determinations "as authorized by the Attorney General" and the proceedings themselves must "be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

1981) (interim rule with request for public comment).[2] Neither this Board nor an immigration judge has authority to consider a challenge to the Attorney General's determination in this regard. Thus, absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA. And, authority from one circuit is not binding in another. *Georgia Dep't of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988); *Generali v. D'Amico*, 766 F.2d 485, 489 (11th Cir. 1985).

In view of the controlling Departmental regulations, we find that the immigration judge in this case had no authority to consider an application for attorney fees and costs under the EAJA. Accordingly, the appeal will be dismissed and the respondent's application for attorney fees and costs under the EAJA will be denied.

ORDER: The appeal from the September 8, 1989, decision of the immigration judge is dismissed and the respondent's application for attorney fees and costs under the EAJA is denied.

Mary Maguire Dunne
FOR THE BOARD

---

2. The supplemental information published with the 1981 interim rule made clear that the omission of deportation and exclusion proceedings from the rule was intentional. Apparently no public comments were received regarding this aspect of the interim rule. *See* 47 Fed. Reg. 15774 (1982) ("Supplementary Information").

APPENDIX C-3

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

OFFICE OF THE IMMIGRATION JUDGE

HARLINGEN, TEXAS 78550

CASE NO.: A23 620 165

IN THE MATTER OF: AMADOR-CASTILLO, HAROLD J.
Respondent

IN DEPORTATION PROCEEDINGS

TO: Carter C. White, Esq.
P.O. Box 188
San Juan, Texas 78589

District Counsel
U.S. Immigration and Naturalization Service
2102 Teege Avenue
Harlingen, Texas 78550

ORDER

On October 20, 1988, counsel of record in the above entitled matter filed with this Court a request for attorney fees pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. Section 504 (1982).

This Court has no authority under the law to grant an award of attorney fees under EAJA. *See Matter of Anselmo*, Interim Decision 3105 (BIA 1989); *Matter of Fede*, Interim Decision 3106 (BIA 1989). Accordingly, counsel's request for such an award must be denied.

WHEREFORE, it is hereby Ordered that the request for attorney fees in this matter be denied in its entirety as a matter of this Court's jurisdiction.

DATED THIS 8th day of September, 1989.

HOWARD E. ACHTSAM
Immigration Judge